terprise on property similarly acquired.[16] They are not estopped to plead their lack of power in order to escape liability on their *ultra vires* contracts.[17] Though the courts will refuse on grounds of public policy to enforce such contracts, the bank will not be permitted to retain any benefit which it may have received under the contract. The other party will be allowed on principles of *quasi*-contract to recover the property or its value upon a repudiation of the contract.[18] In The Village of Fort Loramie[19] case referred to above, a national bank bought in a street railway at a receiver's sale in order to protect the bonds of the company which it owned. The village tried to compel the bank to continue the operation of the road according to the terms of the franchise, and the bank set up its lack of power to assume such an obligation. The court properly held that the bank could not be compelled to perform its illegal contract, and allowed it thereby to escape the duty which it owed to the public as owner[20] of the franchise to operate the road.[21] But instead of permitting the bank to dismantle the road unless a tender was made to it within a limited time of the amount which it paid for the property, the court should, it is submitted, have compelled the bank to put the road up at public auction and accept whatever price it might bring. In this way a purchaser might have been found who would have been willing to operate the road and perform the obligations of the franchise.

PRIVILEGE OF NON-RESIDENTS ENGAGED IN PUBLIC DUTY FROM SERVICE OF PROCESS. — If a person is within the territory [1] of a sovereign,

court held that a bank could carry on a milling business which had been acquired in satisfaction of a bad debt, for the purpose of disposing of it as a going concern. And in Reynolds *v.* Simpson, 74 Ga. 454 (1885), it was held that a state bank was not exceeding its corporate powers by running an iron works similarly acquired, in order to satisfy the debt it held against the former owner. A National Bank may buy wheat in order to seed a farm which it has been compelled to purchase under an execution in its own favor. Nat. Bank *v.* Bannister, 7 Kan. App. 787, 54 Pac. 20 (1898).

[16] Cooper *v.* Hill, 94 Fed. 582 (1899).

[17] California Bank *v.* Kennedy, *supra;* Nat. Bank *v.* Hawkins, *supra;* Nat. Bank *v.* Converse, *supra;* Nat. Bank *v.* Wehrmann, *supra.* The reasons why the courts refuse to apply the doctrine of estoppel in these cases of *ultra vires* acts of corporations are stated in McCormick *v.* Bank, 165 U. S. 538, 549 (1897): "The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

[18] Nat. Bank *v.* Townsend, 139 U. S. 67 (1891); Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 151 (1898); Appleton *v.* Nat. Bank, 190 N. Y. 417, 83 N. E. 470 (1908); Barron *v.* McKinnon, 196 Fed. 933, 938 (1912).

[19] See *supra*, note 1.

[20] Title to the property passes to the vendee bank under an executed *ultra vires* contract. Barron *v.* McKinnon, *supra.* Neither the grantor nor third persons can avoid the conveyance on the ground that the grantee has exceeded its powers. The disregard of the Act of Congress only lays the bank open to proceedings by the government for exercising powers not conferred by law. Kerfoot *v.* Farmers' & Merchants' Bank, 218 U. S. 281 (1910).

[21] On the right of a public utility to cease operation and dismantle its plant, see 32 HARV. L. REV. 716.

[1] For the basis of jurisdiction in European countries see Joseph H. Beale, Jr., "Jurisdiction of the Courts over Foreigners," 26 HARV. L. REV. 193.

however briefly,[2] and is properly served, he may be subjected to the jurisdiction of the courts of that sovereign.[3] But in order to prevent the use of judicial machinery from defeating the very purpose of its existence, the courts have held certain persons indispensable to judicial proceedings privileged from process. It is essential that these persons be free to attend the business of the courts, and, clearly, their presence should not be rendered unavailable by the court's own process. From early times, suitors and witnesses were privileged from arrest, *eundo, morando, et redeundo*.[4] A similar exemption has been enjoyed by members of Parliament [5] summoned by the King's writ since the days when Parliament was still regarded as a court.[6] After the legislative and judicial functions of government were definitely localized the privilege of legislators was continued by statute in England,[7] and is provided for generally by constitutional provisions in the United States.[8] The immunity from arrest existed not only in criminal cases but also in civil cases when the seizure of the person was the normal mode of bringing a defendant before a court.[9] Where physical restraint was not sought the reason for the privilege no longer remained. Consequently, civil actions unaccompanied by arrest did not violate the privilege of members of Parliament,[10] or parties and witnesses, and, while it might constitute contempt to serve process in the presence of the court,[11] the defendant could not abate the suit.[12] To-day, since arrest is no longer the ordinary means for beginning suit, legislators are not exempt from service of summons [13] and resident suitors and witnesses enjoy only the protection afforded by the dignity of the court.[14]

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[2] Mason *v.* Connors, 129 Fed. 831 (1904); Alley *v.* Caspari, 80 Me. 234, 14 Atl. 12 (1888); Peabody *v.* Hamilton, 106 Mass. 217 (1870).

[3] Of course it would be unfair to exercise jurisdiction over persons brought into the state by the fraud or force of the plaintiff. Williams *v.* Reed, 29 N. J. L. 385 (1862). But there is no reason why this should not be done if the plaintiff is innocent of any wrong. Taylor, petitioner, 29 R. I. 129, 69 Atl. 553 (1908). It is no objection that the defendant is in jail. Ramsay *v.* M'Donald, 1 W. Bl. 30 (1748); White *v.* Underwood, 135 N. C. 25, 34 S. E. 104 (1899); Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118 (1822).

[4] See VINER, ABRIDGMENT, Tit. "Privilege," B. pl. 3 (Party); C. pl. 16 (Witness).

[5] "The privilege rests on the supreme necessity of attending the business of Parliament, the King's highest court." 3 STUBBS, CONST. HIST. OF ENG., 495.

[6] See MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY, chap. 3. *Cf.* "A prayer for the High Court of Parliament," BOOK OF COMMON PRAYER.

[7] Act 10 GEO. III, c. 50.

[8] U. S. CONST., Art. I, sec. 6, para. 1; 1 STIM. AM. ST. LAW, 68.

[9] See 3 BLACKSTONE, COMMENTARIES, 282.

[10] Benyon *v.* Evelyn, O. Bridg. 324 (1664). [11] Cole *v.* Hawkins, 2 Str. 1094 (1738).

[12] Poole *v.* Gould, 1 H. & N. 99 (1856); Flechter *v.* Franko, 21 N. Y. Civ. Pro. 34, 15 N. Y. Supp. 674 (1891). See VINER, ABRIDGMENT, Tit. "Privilege," B. Pl. 24. See also Alderson, JUDICIAL WRITS, § 117.

[13] A few states by constitutional provision have extended the common-law immunity from arrest to cover service of civil process. See COOLEY, CONST. LIMITATIONS, 5 ed., p. 161. Two jurisdictions have unjustifiably reached the same result by judicial interpretation. Bolton *v.* Martin, 1 Dall. (Pa.) 296 (1788); Miner *v.* Markham, 28 Fed. (Wis.) 387 (1886). But the weight of authority is *contra*. Howard *v.* Trust Co., 12 App. D. C. 222 (1898); Peters *v.* League, 13 Md. 58 (1858); Rhodes *v.* Walsh, 55 Minn. 542, 57 N. W. 212 (1893); Berlet *v.* Weary, 67 Neb. 375, 93 N. W. 238 (1903); Bartlett *v.* Blair, 68 N. H. 232, 38 Atl. 1004 (1895); Worth *v.* Norton, 56 S. C. 56, 33 S. E. 792 (1899).

[14] But see Cameron *v.* Roberts, 87 Wis. 291, 58 N. W. 376 (1894), (holding the service void).

But special considerations govern the case of non-residents. If the court requires their presence, and will be deprived of it unless they are privileged in civil suits, a perfect case for privilege is made out. Material witnesses frequently reside outside the jurisdiction, and since they cannot be subpœnaed and their presence is necessary for the proper adjudication of controversies, no obstacles should be put in the way of their voluntary appearance. Therefore in accordance with the practical needs of the situation, non-resident witnesses have everywhere been held privileged from service of summons while in a state for the purpose of attending judicial proceedings.[15] The majority of states [16] have the same rule for non-resident parties.[17] But it would seem that it is the party's own interest, whether he be plaintiff or defendant, and not the court's, which demands his presence.[18] The court will not be hampered by his absence, nor will the possibility of other actions keep him away if it is to his advantage to come into a state. Hence the practical necessity for the privilege does not exist. The argument found in the cases granting the immunity, that "the courts should be open and accessible to all" [19] cuts both ways and leads to the conclusion that non-resident parties should be amenable to, rather than privileged from, service of process. In the case of legislators the privilege is granted by the sovereign only to its own lawmakers and can obviously have no extra-territorial effect. Within the territory of the sovereign it is equally violated by arrest at home or in another county, or, under the Federal Constitution, in another state. Even in the few jurisdictions where the immunity extends to civil process, no distinction has been made between service at the residence and elsewhere.[20]

This analysis of the privilege as the privilege of the court has been disregarded in the recent case of *Filer* v. *M'Cornick*,[21] holding exempt from process a non-resident temporarily in the state on public business. The president of a bank, which was a stockholder in the Federal Reserve

[15] Walpole *v.* Alexander, 3 Doug. 45 (1782); Chittenden *v.* Carter, 82 Conn. 585, 74 Atl. 884 (1909); Fidelity and Cas. Co., *v.* Everett, 97 Ga. 787, 25 S. E. 734 (1896); Mayer *v.* Nelson, 54 Neb. 434, 74 N. W. 841 (1898); Mulhearne *v.* Press Pub. Co., 53 N. J. L. 153, 21 Atl. 186 (1890).

[16] Stewart *v.* Ramsey, 242 U. S. 128 (1916); Hale *v.* Wharton, 73 Fed. 739 (1896); Halsey *v.* Stewart, 4 N. J. L. 426 (1817); Matthews *v.* Tufts, 87 N. Y. 568 (1882); Andrews *v.* Lembeck, 46 Ohio St. 38 (1888); Partridge *v.* Powell, 180 Pa. St. 22, 36 Atl. 419 (1897).

[17] To extend the privilege to defendants brought into the state by extradition is to lose sight of the reason for the rule. Reid *v.* Ham, 54 Minn. 305, 56 N. W. 35 (1893); Netograph Man. Co. *v.* Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910). Where the privilege is granted it rests upon interstate courtesy. Martin *v.* Bacon, 76 Ark. 158, 88 S. W. 863 (1905); Compton *et al. v.* Wilder, 40 Ohio St. 130 (1883). The express provisions of treaties affect the case of a person extradited from a foreign country. *In re* Reinitz, 39 Fed. 204 (1889).

[18] The following cases denied the privilege to non-resident plaintiffs: Bishop *v.* Vose, 27 Conn. 1 (1858); Guyen *v.* McDaneld, 4 Ida. 605, 43 Pac. 74 (1895); Baisley *v.* Baisley, 113 Mo. 544, 21 S. W. 29 (1893); Tiedeman *v.* Tiedeman, 35 Nev. 259, 129 Pac. 313 (1912); Baldwin *v.* Emerson, 16 R. I. 304, 15 Atl. 85 (1888). See Chittenden *v.* Carter, *supra*. One jurisdiction denies the privilege to non-resident defendants. Ellis *v.* De Garmo, 17 R. I. 715, 24 Atl. 579 (1892); Capewell *v.* Sipe, 17 R. I. 475, 23 Atl. 14 (1891).

[19] Halsey *v.* Stewart, *supra*, per Southard, J.

[20] Berlet *v.* Weary, *supra*, and cases cited in note 13.

[21] 260 Fed. 309 (1919). See RECENT CASES, *imfra*, p. 734.

Bank, was called by the governor of such bank to attend a conference in another state to discuss means of selling treasury certificates for war purposes. While in the other state he was served with process. The court on motion quashed the service. This decision rests the privilege upon the policy of making public service attractive. It is submitted that responsible men will not be deterred from public duty by a fear of suits in strange jurisdictions. The privilege from process exists solely to prevent the clogging of judicial business,[22] and it is the duty of the court to exercise the powers delegated to it and to refrain therefrom only when required to do so by the exigencies of judicial machinery. When it becomes desirable to have a different set of rules for the enforcement of the personal obligations of men in public life, the legislatures doubtless will enact appropriate legislation.

RECENT CASES

ADOPTION — WILLS — PARTIAL REVOCATION OF A WILL BY ADOPTION OF A CHILD. — A testatrix adopted a child in the manner prescribed by statute. The statute provided that the parties to the adoption should have all the rights and duties incident to the natural relation of parent and child (1915 KAN. GEN. STAT., §§ 6362, 6363). The Statute of Wills provided for the partial revocation of the will of a parent in favor of a child born after the execution of the will (1915 KAN. GEN. STAT., § 11795). *Held*, that the adoption effected a partial revocation of the will. *Dreyer* v. *Schrick*, 185 Pac. 30 (Kan.).

At common law, a will disposing of all the testator's property, and making no provision for the future wife and child, was revoked by subsequent marriage and the birth of a child. *Marston* v. *Fox*, 8 A. & E. 14; *Glascott* v. *Bragg*, 111 Wis. 605, 87 N. W. 853. Since the basis of the rule is the change in the testator's circumstances, the same result has been reached when the child was adopted instead of born into the family. *Glascott* v. *Bragg*, *supra*. Under such a statute of adoption, as in the principal case, an adopted child has been held to come within the term "children" as used in a statute of descent. *Lanferman* v. *Vanzile*, 150 Ky. 751, 150 S. W. 1008. So also as to "issue" in statutes of distribution. *Scott* v. *Scott*, 247 Fed. 976; *Buckley* v. *Frazier*, 153 Mass. 525, 27 N. E. 768. The same result has been reached where the words were "lineal descendants." *State* v. *Yturria*, 204 S. W. (Tex.) 315; *In re Cook's Estate*, 187 N. Y. 253, 79 N. E. 991. In accord with the principal case, it has been held, that, for the purpose of partial revocation of wills, children adopted are children "born." *Bourne* v. *Downey*, 184 App. Div. 476, 171 N. Y. Supp. 264; *In re Sandon's Will*, 123 Wis. 603, 101 N. W. 1089. But there is also authority to the contrary. *Goldstein* v. *Hammell*, 236 Pa. 305, 84 Atl. 772; *Evans* v. *Evans*, 186 S. W. (Tex.) 815. The view of the principal case seems correct, since the adopted child, though it is not a child "born" to the testator, is given by statute all the rights, interests, and duties of such a child. The result should not be affected by the fact that the adoption statute was enacted prior to the statute to be construed. *Buckley* v. *Frazier*, *supra*; *Scott* v. *Scott*, *supra*.

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[22] "The reason for this (denial of privilege) is that such a summons amounting simply to notice does not obstruct the administration of justice nor interfere with the attendance of a party to a suit then on trial." Ellis *v.* De Garmo, *supra*, per Stinnes, J.